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Conflict of Interest: Representating the Insured and the Insurer When Liability Exceeds Coverage - An Ethical Enigma - Hartford Accident & (and) Indemnity Co. v. Foster

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CONFLICT OF INTEREST: REPRESENTING THE INSURED AND THE INSURER WHEN LIABILITY EXCEEDS COVERAGE—AN ETHICAL ENIGMA

Hartford Accident & Indemnity Co. v. Foster

528 So. 2d 255 (Miss. 1988)

INTRODUCTION

Most liability insurance policies provide that the insurance carrier will defend any suit against the insured arising out of an activity which is covered by the insurance policy.[1] In the event of such a suit, the carrier retains an attorney to defend both the insured and the insurer. Generally, unless there is a question of coverage, the attorney's representation of both clients does not, in and of itself, create a conflict of interest, even where damages claimed are in excess of the insured's policy limits.[2] When, however, the damages claimed exceed the policy limits, an offer of settlement is made within the policy limits, and the insured wishes to accept the offer while the insurer refuses—the attorney is faced with a conflict of interest. In *Hartford Accident & Indemnity Co. v. Foster*,[3] the Supreme Court of Mississippi, for the first time, addressed the duties of the attorney faced with this conflict, the duties of the insurer in such a situation, and whether a breach of duty by the attorney may be imputed to the carrier. This note will focus on the court's decision regarding the attorney's ethical duties when such a conflict arises. This note will also address whether the court's decision is in accordance with the Mississippi Rules of Professional Conduct and whether the court's application of its new principles to the facts of the case resulted in a fair decision.

I. FACTS

On August 4, 1976, Donald G. Harris was involved in an automobile accident with James L. Sims. Harris worked for Royce Foster, his father-in-law, who owned and operated Foster Furniture Company. At the time of the accident, Harris was driving a pickup truck while making a furniture delivery.[4] Harris and Sims were traveling in opposite directions on a gravel country road when they collided. Sims suffered severe injuries to his left arm as a result of the accident.[5]

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1. See, for example, the standard provision contained in Hartford's liability policy *infra* note 7.
2. *See infra* note 71 and accompanying text.
3. 528 So. 2d 255 (Miss. 1988).
4. 528 So. 2d at 257.
5. *Id.*

On February 2, 1977, Sims filed suit in the Circuit Court of Simpson County, Mississippi, against Foster, Foster's son, and Harris, claiming $150,000 actual and $150,000 punitive damages. [6] Foster had a liability insurance policy in effect issued through Hartford Accident & Indemnity Company which contained a $50,000 liability limit and a "duty to defend" clause. [7] Pursuant to this "duty to defend" clause, Hartford retained attorney Curtis Coker to defend the action. Coker, in turn, associated George Williamson to assist him in the defense of the case. Hartford sent Foster a letter advising him of his representation. The letter did not, however, warn Foster that he was being sued for damages in excess of his policy limits or that he had the right to retain independent counsel. [8]

Coker and Williamson investigated the accident and concluded that there was no liability, believing the accident was solely a result of Sims's negligence. It was their opinion, however, that Sims would probably be able to make a jury issue of whether Harris was the negligent party. [9]

On the morning of the trial, Sims's counsel offered to settle for $45,000, an amount within Foster's policy limits. Coker discussed the settlement offer with Foster, who advised Coker that he wished to accept the offer. [10] Coker did not, at this time, advise Foster to retain or consult with independent counsel. [11] Coker then informed Hartford of the settlement offer and of Foster's desire to accept the offer. Coker related his concern that Foster was underinsured and advised Hartford that, given Foster's exposure, they should consider settling the case for between $20,000-$25,000 if such opportunity arose. Hartford rejected the $45,000 settlement demand. [12] During trial, Sims's counsel reduced their offer to either $35,000 or $40,000 which Hartford again rejected. [13] At the close of the trial, after the jury retired to reach a verdict, Sims's counsel reduced the

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6. *Id.*

7. The policy contained the following standard provision:

[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigation *and settlement of any claim or suit as it deems expedient.* . . .

528 So. 2d at 257-58 n.1 (emphasis in original).

8. 528 So. 2d at 257-58. Hartford's policy manual provided a form letter to be sent to insureds who were exposed to liability in excess of their policy limits. This form letter provided that: "Since the amount of damages demanded is in excess of your policy limits, you may, if you wish, at your own expense, retain personal counsel to further protect your interests. We will be glad to cooperate with whomever you select." *Id.* at 258.

9. 528 So. 2d at 258, 260.

10. 528 So. 2d at 260. Foster did express, however, his continued belief that Harris was not at fault. *Id.*

11. Coker maintained that, when he was retained, he had advised Foster of his right to retain his own attorney. *Id.*

12. *Id.*

13. 528 So. 2d at 260-61. The testimony at trial was in dispute as to whether or not Coker informed Foster of any offers subsequent to the $45,000 settlement offer. 528 So. 2d at 261. It is important to note here that in the appeal of a lower court's decision, the reviewing court must view the evidence in a light most favorable to the party who prevailed below. *See, e.g.*, Maness v. Illinois Cent. R.R., 271 So. 2d 418, 421-22 (Miss. 1972). Thus, on appeal the evidence should have been viewed in the light most favorable to Foster.

settlement offer to $30,000. Coker and Williamson discussed the offer, both expressing confidence that the verdict would be in favor of the defendant or not in excess of an $18,000 verdict for the plaintiff. Coker related this opinion to Hartford, again recommending that $25,000 be offered to Sims. Hartford agreed, rejecting the $30,000 offer but authorizing a $25,000 counteroffer.[14] Coker mentioned this amount to Sims's counsel who did not accept.[15] Again, Foster was not advised of these settlement discussions.[16]

The jury returned a verdict in the amount of $80,000 in favor of Sims. Coker then offered Sims $50,000, the policy limits, in settlement. This offer was rejected. The defendants appealed to the Supreme Court of Mississippi, which affirmed the verdict without an opinion[17] Foster was required to pay $30,000[18] plus a $100 letter of credit fee. Hartford paid all appeal costs, interest, and penalties.[19]

Foster filed suit against Coker, Williamson, and Hartford on February 25, 1980, seeking actual damages of $920,000 and punitive damages of $1,000,000. The declaration alleged that, in assuming control of the defense of Foster's case, the defendants had a duty to properly conduct litigation and subsequent negotiations, to consider Foster's interests as well as Hartford's in evaluating settlement offers, and to exercise good faith toward Foster.[20] The complaint further alleged that Coker and Williamson had deliberately given preference to Hartford over Foster in failing to settle within the policy limits.[21] After a trial on these issues, a jury returned a verdict in favor of Foster in the amount of $30,000.[22]

II. History and Background

The question of what duties an attorney, representing both the insured and the insurer, owes to an insured client when a settlement offer within the policy limits is made on a case of questionable liability had never before been addressed by the courts of Mississippi. The Supreme Court of Mississippi was, therefore, writing on a clean slate in the appeal of this suit. Other jurisdictions had,

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14. *Id.*

15. *Id.* Testimony was in conflict as to whether or not Coker made an affirmative counteroffer. Sims's counsel later testified, however, that, if such an offer had been made, it would have been rejected. *Id.*

16. *See supra* note 13.

17. 528 So. 2d at 259.

18. This figure represented the difference between the amount of the judgment ($80,000) and Foster's policy limits ($50,000).

19. 528 So. 2d at 259.

20. 528 So. 2d at 260.

21. The declaration contained three counts: Count I contained an allegation that an offer of $30,000 was concealed from Foster; Count II alleged that the defendants' conduct constituted "wilful oppression and arbitrary action so unreasonable as to constitute fraud," and was in "reckless disregard" of Foster's rights; Count III alleged that in rejecting settlement offers within the policy limits and in representing conflicting interests, the defendants became strictly liable for Foster's damages. 528 So. 2d at 260.

22. 528 So. 2d at 263.

though, resolved such a question. For example, in *Hamilton v. State Farm Mutual Automobile Insurance Co.* [23] the insureds asserted a claim against the insurance carrier to recover the amount of a judgment entered against the insureds in excess of their policy limits. The judgment arose out of a claim for injuries sustained by a six-year-old boy who was struck by a vehicle driven by one of the insureds, whose liability insurance policy contained a $10,000 limit. [24] The attorney and the carrier determined at the outset that $2,500 was the maximum amount that should be offered in settlement and offered only that amount, whereas later testimony established that the probable verdict value was between $55,000 and $75,000. [25] The insureds were never included in the settlement decisions or negotiations and denied ever being told of settlement offers of $5,000 and $7,500 made by the plaintiffs. [26] The insureds suffered a judgment of $35,000 over their policy limits and in their subsequent action against the insurance company recovered that same amount. [27] In affirming the verdict against the carrier for the conduct of its attorney, the Washington Court of Appeals held that whether the failure of the attorney to "properly . . . advise and represent" [28] the insureds was the proximate cause of their damages was a question for the jury. [29] The court further held that the insureds were "entitled to the undivided loyalty of the attorney representing them" [30] and that the attorney could continue to represent both parties only after obtaining their consent. [31] The court noted, however, that it was "unrealistic to believe that [the attorney], who was, in effect, the 'house counsel' for [the carrier], could give his undivided loyalty to [the insureds] while in that relationship with [the carrier]." [32]

Lysick v. Walcom, [33] involved a claim for $450,000 made upon the estate of the deceased, who had an insurance policy in effect providing $10,000 liability coverage. The claim was brought on behalf of two family members killed in an automobile accident allegedly caused by the deceased insured. The claimants offered to settle the case for $12,500. The administrator of the estate demanded that the insurance company pay the policy limits and offered to contribute the additional $2,500 over the policy limits in order to effectuate the settlement. [34] The insurance company refused to offer more than $9,500 and retained the defendant attorney to defend the suit, advising him that, while they considered the case to be one of liability, the attorney should refrain from

23. 9 Wash. App. 180, 511 P.2d 1020 (1973).
24. *Id.* at 181, 511 P.2d at 1021.
25. *Id.* at 184, 511 P.2d at 1023.
26. *Id.* at 184, 511 P.2d at 1023.
27. *Id.* at 181, 511 P.2d at 1021.
28. *Id.* at 185, 511 P.2d at 1023.
29. *Id.* at 185, 511 P.2d at 1023.
30. *Id.* at 185, 511 P.2d at 1024.
31. *Id.* at 186, 511 P.2d at 1024.
32. *Id.* at 186, 511 P.2d at 1024.
33. 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).
34. *Id.* at 141, 65 Cal. Rptr. at 410.

offering the full $10,000 until a "propitious moment." [35] By the time this "moment" arrived, which was after a pretrial conference had been held and only ten days prior to trial, the estate was without the funds to contribute and the settlement fell through. A judgment was rendered in favor of the plaintiffs in the sum of $225,000, whereupon the defendant's estate filed suit against the insurance company, alleging bad faith, and against the attorney, alleging negligence. [36] The California Court of Appeals held that an attorney may represent conflicting interests only where the clients consent after full disclosure is made and that failure to disclose renders the attorney liable to the client who was damaged by such non-disclosure. [37] The defendant attorney breached his duty to the insured, the court held, by failing to disclose the following: that he was only representing the insurance company in settlement negotiations; that the insurance company accepted the case as one of liability; and that an offer of settlement had been made by the defendant attorney and rejected by the plaintiffs. [38]

In *Gibson v. Western Fire Insurance Co.*, [39] the Montana Supreme Court affirmed a verdict in favor of the insured plaintiff, who, after suffering a judgment greatly in excess of his medical malpractice insurance limits, had sued his insurance carrier and the attorneys who defended the claim alleging bad faith and negligence, respectively. Dr. Gibson had been forced to pay $83,750 over his policy limits as a result of a judgment entered against him in the malpractice claim in which his liability was admitted. [40] The court held that the insurance company and the attorneys handling the defense failed to properly investigate and evaluate the malpractice claim and had refused in bad faith to settle the claim within policy limits. [41]

Betts v. Allstate Insurance Co. [42] also involved a breach of duty by the attorneys who defended the insured under a liability policy, to the insured who had suffered a judgment of $350,000 over her policy limits. In holding the attorneys partially liable for the insured's damages, [43] the California court held that

35. *Id.* at 142-43, 65 Cal. Rptr. at 410-11.

36. *Id.* at 143-44, 65 Cal. Rptr. at 411-12. The bad faith claim against Allstate, the insurance company, was later settled for $89,000. 258 Cal. App. 2d at 144, 65 Cal. Rptr. at 412.

37. *Id.* at 146-48, 65 Cal. Rptr. at 413-14.

38. *Id.* at 151-52, 65 Cal. Rptr. at 416-17. The case was remanded to the trial court for a retrial on the single issue of whether the defendant attorney's negligence proximately caused the plaintiff's damage. 258 Cal. App. 2d at 158, 65 Cal. Rptr. at 421.

39. 210 Mont. 267, 682 P.2d 725 (1984).

40. The malpractice claim arose out of Dr. Gibson's treatment of a patient wherein the doctor pierced the patient's eyeball while attempting to inject the patient's eyelid with anesthetic. As a result, the patient suffered a cataract and almost total loss of the use of his eye as well as psychological damages. *Id.* at 267, 682 P.2d at 729-30.

41. Offers of $75,000 and $100,000 had been made by the plaintiffs in the malpractice claim while the insurance company, through counsel, refused to offer more than $25,000. *Id.* at 267, 682 P.2d at 731-34.

42. 154 Cal. App. 3d 688, 201 Cal. Rptr. 528 (1984).

43. The attorneys were held liable for damages including humiliation, emotional distress, and worry. 154 Cal. App. 3d at 715, 201 Cal. Rptr. at 544.

an attorney has a duty to "protect his client in every possible way"[44] and that this duty is breached when the attorney takes a position adverse to the client without full disclosure and consent.[45] The court further held that this obligation is in no way lessened by the fact that the attorney has been employed by the insurance company.[46] The attorneys were found to have breached their duties owed to the insured client by failing to disclose to her the conflict of interest, failing to demand settlement, and failing to advise the insured of the wisdom of obtaining independent legal counsel.[47] Numerous other cases have addressed the issue of an attorney's duty to the insured client when an offer of settlement is made within the insured's policy limits.[48]

In addition to case law, the rules governing an attorney's professional conduct provide controlling guidelines on this issue.[49] The preamble to the Mississippi Rules of Professional Conduct[50] offers a broad definition of an attorney's role, providing in part:

> As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.[51]

The general rule regarding a conflict of interest where the attorney represents dual interests is found in rule 1.7(b) which provides that:

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44. *Id.* at 715, 201 Cal. Rptr. at 544.

45. *Id.* at 715, 201 Cal Rptr. at 544.

46. *Id.* at 716, 201 Cal. Rptr. at 545.

47. *Id.* at 717, 201 Cal. Rptr. at 546. The attorneys also failed their client by assisting the insurance company in manufacturing a false record to avoid a bad faith lawsuit; acting solely in the interest of the insurance company and against the insured; resisting efforts of independent counsel to become informed once such counsel was finally hired; and in discouraging the insured from assigning her rights in consideration for a personal release, advising instead that she file bankruptcy. *Id.* at 717, 201 Cal. Rptr. at 546.

48. *See, e.g.*, National Farmers Union Property & Casualty Co. v. O'Daniel, 329 F.2d 60, 66 (9th Cir. 1964) ("At the moment [the insured] demanded settlement . . . while [the insurer] refused to settle, a conflict of interest arose between [the attorney's] two clients. He could not, ethically, continue to represent them both—he must withdraw from the case with regard to one or the other"); Purdy v. Pacific Auto. Ins. Co., 157 Cal. App. 3d 59, 78, 203 Cal. Rptr. 524, 535 (1984) (claim that attorney, representing both insurer and insured, was liable to insured for failing to effectuate settlement of the claim was "fatally defective due to failure to plead sufficient proximate cause"); Merritt v. Reserve Ins. Co., 34 Cal. App. 3d 858, 110 Cal. Rptr. 511 (1973) (no actual conflict of interest arose where no settlement offers were made nor any indication given that settlement of the claim was feasible); Ivy v. Pacific Auto. Ins. Co., 156 Cal. App. 2d 652, 663, 320 P.2d 140, 148 (1958) (attorney representing both insurer and insured breached duty to insured in "stipulat[ing] away the insured's rights without his consent for the benefit of [the insurer]."); Cousins v. State Farm Mut. Auto. Ins. Co., 294 So. 2d 272, *cert. den.*, 296 So. 2d 837 (La. 1974) (insurer not liable to insureds for excess judgment where insureds continuously told counsel for both that they did not want to settle and where insureds were kept fully informed of their possible exposure).

49. The Mississippi Rules of Professional Conduct are expressly not intended to provide a basis for civil liability. Violations of these rules do not give rise to a cause of action nor create a presumption that a duty has been breached. They do, however, "define proper conduct for purposes of professional discipline." MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Scope (1987). The Mississippi Rules are based largely upon the MODEL CODE OF PROFESSIONAL RESPONSIBILITY, with few variations.

50. MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Preamble (1987).

51. *Id.*

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client . . . unless the lawyer reasonably believes:

(1) The representation will not be adversely affected; and

(2) The client has given knowing and informed consent after consultation. The consultation shall include explanation of the implications of the representation and the advantages and risks involved. [52]

Rule 1.8(f) specifically addresses the potential conflict of interest which may arise where an attorney represents both the insurance carrier and the insured, and the insurance carrier is paying the attorney's fee. The rule provides that the attorney may not accept compensation for his representation of a client from a person other than the client unless the client consents after consultation, the attorney's independent professional judgment is not impaired, there is no interference with the attorney-client relationship, and confidentiality of information remains protected. [53]

Communication between the attorney and his client is an essential element of their professional relationship. The client should be kept sufficiently informed of key developments which unfold concerning his claim or defense such that he may participate in the decisions made. [54] Clearly, when a conflict of interest develops [55] or an offer of settlement has been made, [56] the Rules of Professional Conduct require that the client be advised of the development and its possible ramifications.

Rule 1.4 of the Mississippi Rules of Professional Conduct requires that a client be kept reasonably informed about the status of a matter and that the attorney explain the matter to the client in such a way that the client is able to make informed decisions regarding the representation. [57] Rule 1.2 requires that the attorney defer to the decision of the client as to whether to accept a settlement offer, unless the attorney has limited the scope of his representation after obtaining his client's informed consent to such. [58]

Finally, rule 1.3 provides guidance to the attorney faced with conflicting interests by requiring that he act with "reasonable diligence and promptness" in representing his client. [59] The comment to rule 1.3 explains that an attorney

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52. MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1987); *See also* Disciplinary Rule 5-105 (A).

53. MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1987).

54. *See* MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.5 comment (1987).

55. "[B]efore a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation." Ethical Canon 5-16 (superseded in 1970 by the adoption of the Rules of Professional Conduct).

56. "A lawyer who receives from opposing counsel an offer of settlement . . . should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable." MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.4 comment (1987).

57. MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1987).

58. MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1987).

59. MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1987).

must zealously represent his client; he should act with "commitment and dedication to the interests of the client."[60] Obviously, an attorney cannot zealously represent two clients at the same time where the interests of those clients are, or have become, adverse to one another.

III. INSTANT CASE

On appeal, the Mississippi Supreme Court first addressed the issue of whether Hartford had a duty to settle Foster's lawsuit within the limits of his insurance policy. Hartford argued that it was under no duty to accept any of the settlement offers, given Harris's apparent nonliability for Sims's injuries.[61] In analyzing Hartford's duty to Foster, the court held that Hartford had a fiduciary duty to look after Foster's interests "at least to the same extent as its own"[62] and also to "make a knowledgeable, honest, and intelligent evaluation of the claim commensurate with its ability to do so."[63] The court determined, however, that Hartford had not acted negligently or in bad faith.[64] The court based this determination on Hartford's reasonableness in evaluating the claim as one of nonliability.[65]

Second, the court addressed the issue of whether, if Coker and Williamson breached their fiduciary duty to Foster by giving preference to Hartford's interest, Hartford could be held liable for such breach.[66] The court held that under such circumstances liability for the attorney's breach of fiduciary duty could be imputed to the insurer who employed the attorney.[67] The most difficult issue that the court faced, and the one which this note will address, is whether Coker and Williamson breached their duties as counsel for Foster and, if so, whether Foster was harmed by such breach. In analyzing the attorney's duty toward his client when their interests become divergent, the court first set out some general guidelines. In accord with rule 1.7 of the Mississippi Rules of Professional Conduct, the court held that when adversity between the attorney's two clients appears, the attorney must make an objective determination as to whether he can faithfully represent both parties. If he cannot, he must terminate the employment.[68] If the attorney reasonably believes that he can faithfully

60. MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.3 comment (1987).
61. 528 So. 2d at 263.
62. 528 So. 2d at 265.
63. *Id.*
64. 528 So. 2d at 265-66.
65. 528 So. 2d at 266-67. The court also based its finding of good faith on the fact that Hartford promptly offered to pay the policy limits following final judgment for Sims and on the fact that Harris did not testify at the subsequent trial, which the court interpreted as evidence that Harris did not disagree with Hartford's evaluation. 528 So. 2d at 267.
66. 258 So. 2d at 267-68.
67. 258 So. 2d at 268.
68. 528 So. 2d at 268.

represent both clients, then he must discuss with both clients the full implications of such representation and must obtain their informed consent to proceed.[69] The court ruled that, even if both parties consent to his dual representation, the attorney may not represent two parties where the relationship will require him to make decisions favoring one client at the expense of the other.[70]

The court acknowledged that a conflict of interest does not necessarily arise every time an attorney is hired to defend a case in which the damage claim exceeds the policy limits. In this situation the attorney's goals favor both parties: He seeks to obtain a defense verdict or to at least keep the damages to a minimum.[71] When, however, a settlement offer within the policy limits is made, the attorney is faced with a potential conflict of interest. At this point the insured's interest becomes adverse to the carrier's if the insured wishes to accept the offer and the carrier declines. The court held that when this adversity arises, the attorney must immediately do two things: first, he must attempt to halt the trial proceedings so that a decision regarding the settlement offer can be reached before any trial developments occur which might harm either party; second, he must fully inform each client of the settlement offer.[72]

Once these two steps are complete, the attorney is faced with a delicate situation. The court recognized that the attorney may not act to the detriment of either client, rejecting the argument that he should advise in favor of the settlement when it is his opinion that settlement would be against the insurer's best interest.[73] The court also rejected the theory, at least in this case, that the attorney should immediately withdraw.[74] Instead, the court held that the attorney should inform the insured that he cannot offer the insured legal advice regarding the offer, advise the insured to inform the carrier what he desires the carrier to do, and, if appropriate, the attorney should advise the insured to seek independent legal counsel.[75] Also, the attorney should inform the carrier of the existence of conflicting interests and advise the carrier of the fiduciary duty it owes the insured in such a situation. This is the duty to "carefully protect the interest of the insured to the same extent as its own."[76] The attorney must also recognize at this point that, by making a recommendation to the carrier which jeopardizes the insured's interest, he could be violating the ethical

69. *Id.*

70. 528 So. 2d at 269. *See* MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.2(c) (1987).

71. 528 So. 2d at 269.

72. 528 So. 2d at 270.

73. 528 So. 2d at 272.

74. This solution was espoused in National Farmers Union Property & Casualty Co. v. O'Daniel, 329 F.2d 60 (9th Cir. 1964) and rejected by the court in this situation where settlement was offered immediately prior to trial. Granting the motion to withdraw would have necessitated a continuance, if not a mistrial. 528 So. 2d at 272 and n.11.

75. 528 So. 2d at 272-73. The court determined that in many instances independent legal counsel will be of limited value to the insured, as he will merely echo the insured's demand that the carrier settle the case. 528 So. 2d at 273 n.12.

76. 528 So. 2d at 273.

duties owed the insured. He may need to refrain from making such a recommendation. [77]

Allegedly applying these general rules to Coker's and Williamson's handling of Foster's defense, the Mississippi Supreme Court reversed the jury verdict in favor of Foster, holding that Coker and Williamson were not liable to Foster and should have been granted a directed verdict. The court reasoned that Coker and Williamson fulfilled their duty to inform Foster at the outset that he was being sued for damages in excess of his policy limits and that they had fully informed Foster of the first settlement offer of $45,000. [78] While Coker should have advised Foster at that time to seek independent counsel, the court determined that Foster was not harmed by Coker's failure to do so. [79] The court explained that, even if Foster had hired independent counsel to demand that Hartford accept the settlement offer, Hartford would not have been any more swayed to do so than it was by Foster's demand communicated through Coker. [80] As to the duty to inform Foster of the last two settlement offers, the court again held that even if this duty was breached, Foster suffered no damage as a result of such breach. The court based this conclusion on the absence of any evidence indicating that Foster might have offered to pay, out of his own pocket, the $5,000 difference between Sims's $30,000 offer and Hartford's $25,000 counteroffer in order to consummate the settlement. [81] Finally, the court held that no conflict of interest claim arose out of Coker's recommendation to Hartford that the case be settled for $25,000 if possible. The court determined that Coker was justified in believing the automobile negligence case to be one of nonliability and, therefore,that this recommendation was made solely to benefit and protect Foster. [82] The court rejected the notion that Coker should have recommended a higher figure, reasoning that to do so would have resulted in Coker giving preferential status to Foster over Hartford—a duty the court did not see fit to impose. [83]

IV. ANALYSIS

The guidelines set forth by the court provide reasonable and viable solutions to a difficult situation. The court's failure in this case lies not in the guidelines offered, but rather in its refusal to apply them to Coker's and Williamson's conduct, choosing instead to exonerate the attorney's on an untenable "lack of damages" theory.

The court simply ignored the soundly reasoned holdings of several other juris-

77. *Id.*
78. 528 So. 2d at 274.
79. *Id.*
80. *Id.*
81. 528 So. 2d at 274-75.
82. 528 So. 2d at 275.
83. 528 So. 2d at 276.

dictions, including *Betts*,[84] *Lysick*,[85] *Gibson*,[86] and *Hamilton*,[87] despite their factual similarities to the case at bar, stating "[t]here are many cases where attorneys representing insurance companies and their insureds have been held to account for breach of professional duty . . . . This is not such a case."[88] This author disagrees.

Loyalty is one of the foremost duties that an attorney owes his client.[89] Based upon that premise, professional standards prohibit an attorney from representing two clients whose interests are, or become, divergent.[90] When an attorney is hired by an insurance carrier to defend an insured on a disputed claim, which seeks damages in excess of the insured's policy limits, the potential for a conflict exists.[91] When an offer of settlement is made within the policy limits which the insured wishes to accept and the carrier wishes to reject, the conflict is real. At that juncture it is difficult to conceive how an attorney can zealously represent both clients, or how his loyalty to both clients can remain unwavering.[92] The insured is demanding that the attorney accept the settlement offer in order to eliminate the risk that he may be held personally liable for an excess judgment. The insurance carrier, who is willing to take the limited risk that the policy limits will have to be paid, is resisting the offer to settle, in hopes that a favorable judgment will be rendered.

This is exactly the situation that Coker and Williamson found themselves faced with on the morning of their client's trial when opposing counsel offered to accept $45,000 in settlement, Foster demanded that the offer be accepted, and Hartford refused to pay. What were Coker's and Williamson's duties at this moment? First of all, it is not unrealistic to expect the attorneys to have foreseen, prior to the morning of the trial, that this conflict might arise. Foster was obviously underinsured,[93] damages demanded were $250,000 over Foster's policy limits, and the accident was one of disputed liability. While Foster may have been advised initially that he could obtain independent counsel,[94] Coker

84. Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 201 Cal. Rptr. 528 (1984). *See supra* notes 42-47 and accompanying text.

85. Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968). *See supra* notes 33-38 and accompanying text.

86. Gibson v. Western Fire Ins. Co., 210 Mont. 267, 682 P.2d 725 (1984). *See supra* notes 39-41 and accompanying text.

87. Hamilton v. State Farm Mut. Auto. Ins. Co., 9 Wash. App. 180, 511 P.2d 1020 (1973). *See supra* notes 23-32 and accompanying text.

88. 528 So. 2d at 276.

89. *See* MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1987).

90. *See* MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1987); *See also* Disciplinary Rule 5-105.

91. The potential for a conflict between an insurer and insured can arise under other circumstances. For example, where the carrier is defending under a reservation of rights, or where the plaintiff and defendant are both insured by the carrier and collusion is a possibility, or where coverage is questionable, a conflict may exist. This article does not attempt to address these issues; however, the guidelines set forth by the court may be applicable in those situations as well.

92. *See supra* note 32 and accompanying text.

93. The court chastised Hartford for this in light of the fact that greater coverage was probably available for only modest premium increases. The court indicated that Hartford's local agent had a responsibility to at least inform Foster that his coverage was inadequate for his needs. 528 So. 2d at 266.

94. *See supra* note 11.

never *recommended* that Foster pursue this option. Nor was there any mention that, in the event of a settlement offer within policy limits, Coker and Williamson would be faced with a conflict of interest in which they could not possibly offer zealous and unlimited representation to both clients. [95] Foster should have been advised from the beginning where Coker and Williamson would place their loyalty if such a conflict arose. [96] If Hartford's, and not Foster's, interest was going to receive priority, then Foster should have been strongly advised to retain his own counsel, whose loyalty would be undivided. [97] Further, the insurance company should be responsible for absorbing the cost of hiring independent counsel. One of the services which the insured is entitled to receive upon his purchase of a liability insurance policy is, as stated by Justice Robertson in his dissent, "a prepaid automobile liability legal defense plan designed (among other things) so that it affords the insured the same zealous advocate he would have if he hired counsel on his own." [98]

Even if Coker and Williamson were justified in not foreseeing the potential conflict of interest and disclosing such to their clients prior to the day of trial, there still existed viable solutions to the dilemma on the morning of the trial when the first offer was made. First and foremost, both Foster and Hartford should have been advised, not only of the offer, but more importantly, of the conflict and its implications. Foster was advised of the offer but he was not advised of the conflict, nor of the wisdom of obtaining independent counsel. The court acknowledged that these steps should have been taken but denied that Foster would have benefited from such advice, stating:

> Had such attorney been consulted, a demand from him that the case be settled within policy limits at the peril of a later suit by Foster for bad faith refusal to settle would have been the best service he could have rendered. Foster secured all those rights for himself when he requested the suit to be settled within policy limits. [99]

Such reasoning is speculative at best. Coker and Williamson had a *duty* to inform Foster of the conflict and either to obtain his consent to proceed, or to withdraw as his representative. [100] In failing to do either, Coker and Williamson breached this duty. Assuming that independent counsel for Foster, in demanding acceptance of the offer, would have had no more effect on Hartford's decision than Foster's *pro se* demand is pure conjecture. Whether or not Foster was damaged by the breach of duty was a question of fact for the jury

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95. Nor was Foster advised that his interest would be given secondary preference to Hartford's under such circumstances.

96. *See* 528 So. 2d at 289 (Robertson, J., dissenting).

97. *See id.* at 289.

98. 528 So. 2d at 288. (Robertson, J., dissenting).

99. 528 So. 2d at 274.

100. MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1987). Surely Foster's need for protection at this point outweighed the inconvenience of continuing the trial.

to determine.[101] The jury answered this question in favor of Foster. Foster had a right at every stage of his defense, unless he gave his informed consent to the contrary, to be zealously represented by an attorney whose loyalty was undivided. Coker and Williamson could not, and did not, offer undivided loyalty. They chose to proceed in the face of a conflict, attempting to balance their loyalties. "Zeal" and "undivided loyalty," however, are not conducive to compromise.

The duties owed Foster by Coker and Williamson were further breached as the trial progressed and the settlement figure was reduced. Foster testified that he was not told of these offers.[102] Again the court held that Foster was not harmed by this breach, reasoning that Foster probably would not have agreed to pay the $5,000 difference between Sims's $30,000 offer and Hartford's $25,000 counteroffer. Aside from being speculative, this argument misses the point. Foster had *no duty* to proffer $5,000 in order to effectuate a settlement within his policy limits. Coker and Williamson, on the other hand, had an affirmative duty to act in the best interest of Foster—especially when the time had long since passed when they might have limited their representation of Foster with his consent.[103] The duty to act in Foster's best interest encompassed the obligation to give Foster their best legal opinion as to how the trial was going;[104] to keep him informed of the progress of settlement negotiations;[105] and, most importantly, to abide by Foster's decision to settle the case[106] by demanding such from Hartford. Granted, Coker and Williamson owed a duty of loyalty to Hartford as well as to Foster, and they could not force Hartford to accept the offer. However, unless Coker and Williamson were willing to aggressively recommend acceptance, they should not have been charading as Foster's attorneys. Foster should have either been provided with an attorney who was in a position to render uncompromised and loyal representation or he should have been informed of, and consented to, their limited representation.

The same reasoning applies to Coker's and Williamson's recommendation to Hartford that $25,000 be offered in settlement. The court found that this ad-

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101. *See supra* note 29 and accompanying text.

102. *See supra* note 13. Coker and Williamson testified that Foster was informed of these offers. Thus, a jury question was presented—a question the jury apparently resolved in favor of Foster. The court had given great deference to the jury's verdict in the automobile negligence trial when it came up on appeal—affirming without opinion. Contradictorily, in deciding the subsequent action against Hartford, Coker, and Williamson, the court treated this prior verdict as one rendered against the overwhelming weight of the evidence. See, for example, the court's statement that no insurance company should be faulted for refusing to pay a claim "when it has every reason to believe its insured was not at fault." 528 So. 2d at 266. Compounding the contradiction is the subsequent lack of credence given by the court to the jury's verdict in favor of Foster in the case at issue.

103. *See* 528 So. 2d at 289-92 (Robertson, J. dissenting). *See also* MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.2 Rule 1.7 (1987).

104. *See* MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1987).

105. *See* MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1987).

106. *See* MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1987).

vice was offered solely to protect Foster. [107] Such a finding is wholly contradictory to the court's admonition that the attorney "must scrupulously guard against violating his *absolute nondelegable duty not to urge, recommend or suggest* any course of action to the carrier which violates his conflict of interest obligation." [108] Coker *recommended* that Hartford reject the $30,000 offer and, instead, make a $25,000 counteroffer. Undoubtedly, this recommendation violated his "conflict of interest obligation" [109] to Foster and caused Foster damage. The case could have been settled then and there, eliminating Foster's exposure. And, as noted by Justice Prather in her dissent, Coker testified that "Hartford followed his recommendations 'to the T.'" [110] By making such a recommendation, Coker took a position adverse to one of his clients, in direct violation of the court's guidelines and the Rules of Professional Conduct. [111]

Unquestionably, Hartford had as much right to diligent representation as did Foster. Coker and Williamson, however, could not ethically or practically attempt to offer undivided loyalty and uncompromised diligence to both clients after their client's interests had ceased to be parallel. They chose, although very possibly with good faith intentions, to give preference to Hartford's interest by gambling on a favorable jury verdict. Foster had no desire to take such a risk. As a result of Hartford's, Coker's, and Williamson's decision to gamble, Foster was unwillingly exposed to $250,000 in liability and he suffered actual monetary damages in the amount of a judgment $30,000 in excess of his insurance coverage. Given the vast disparity between Foster's and Hartford's net worth, Foster assumed the greater risk and suffered the greater loss as a result of this gamble.

CONCLUSION

The court set out reasonable guidelines for an attorney faced with a similar conflict of interest to follow. These guidelines permit an attorney to continue to represent both the insured and the insurer, with the clients' consent, on a limited basis. [112] They also offer the attorney the option of representing only one of the clients or withdrawing altogether. [113] Importantly, the court requires the attorney to keep the clients informed as to the status of their representation as well as of any key developments, such as a settlement offer. [114]

Unfortunately, the court wholly failed to apply these guidelines to the case

107. 528 So. 2d at 275.
108. 528 So. 2d at 273 (emphasis added).
109. *Id.*
110. 528 So. 2d at 285 (Prather, J., dissenting).
111. *See* MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1987).
112. *See supra* notes 69, 75-77 and accompanying text; *infra* notes 118-124 and accompanying text.
113. *See supra* note 69 and accompanying text; *infra* note 117 and accompanying text.
114. *See supra* note 72 and accompanying text; *infra* notes 118, 120 and accompanying text.

at hand. Coker and Williamson failed to inform Foster of the conflict, failed to obtain his consent to proceed, and failed to limit their representation of Foster. They failed to advise him of several settlement offers, failed to recommend that he obtain independent counsel once an offer of settlement within the policy limits was made, and failed to limit their involvement in settlement negotiations. Whether these breaches proximately caused Foster's damages was a question for the jury; [115] a question it answered in favor of Foster. The jury's verdict should have been respected by the court.

Despite the injustice of this decision, the court has laid down guidelines which presumably are to be followed by insurance defense counsel caught in a similar situation in the future. They are summarized as follows.

As soon as the existence of a conflict of interest between his clients becomes apparent, the attorney must recognize the conflict and make an objective determination as to whether or not he can faithfully represent both clients. [116] If he cannot, he must withdraw from the representation of at least one client (or not accept the employment in the first place if such conflict is apparent from the outset). [117] If the attorney determines that he can faithfully represent both parties, he must disclose to both clients the existence of the conflict, must explain the implications of such dual representation, and must receive their knowing and informed consent to proceed. [118] He should certainly advise the insured of the option of obtaining independent counsel, regardless of who is responsible for the cost of doing so.

When an offer of settlement within the policy limits is made, the attorney should immediately attempt to halt trial proceedings. [119] He must then fully inform both clients of the settlement offer. [120] Although normally at this point an attorney would offer his advice as to whether or not the offer should be accepted, the attorney should refrain from offering such advice, thus not attempting to represent either party as to the settlement offer. [121] His advice should be limited to directing the insured to inform the carrier of his desires regarding the offer and advising the client of the wisdom of obtaining independent legal counsel, if appropriate. [122] His advice to the carrier should be limited to a clarification of the duty that the insurer owes its insured under these circumstances,

115. *See supra* notes 29, 102.

116. 528 So. 2d at 268. Even with their consent, the attorney may not represent both clients where doing so will benefit one client to the detriment of the other. MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1987).

117. 528 So. 2d at 268.

118. *Id.*

119. 528 So. 2d at 270. Presumably, the trial judge will grant a continuance, or at least a lengthy recess, to allow the attorney to consult with his client about this important development.

120. *Id.*

121. Refusal to render advice at this point does not violate the attorney's ethical duties because the attorney, if he is following these guidelines, has already obtained his client's consent to proceed with his representation despite the existence of a conflict. *See supra* note 118; MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1987).

122. 528 So. 2d at 272-73.

which is to protect the insured's interests to the same extent as its own interests. [123] Beyond this advice, an attorney should offer only his objective evaluation of the case, without recommending a course of action. [124]

In summation, a prudent defense attorney faced with a similar conflict of interests should proceed carefully to assure that he acts within the foregoing guidelines. He should emphasize to both clients the advantage of having independent counsel whose loyalties are not being tested. Most importantly, he should not rely on the court's application of these guidelines in the present case. The court will probably be reluctant to justify, a second time, the exoneration of an attorney who has so obviously violated several rules of professional conduct, regardless of how well respected or experienced that attorney might be. It seems even less likely that the court would again attempt to justify a finding of no damages where an insured has suffered a substantial excess judgment.

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123. 528 So. 2d at 273.

124. By allowing the attorney to offer the carrier his objective evaluation of the case, the court avoided placing the attorney in a precarious position with his steady client—the insurance company. Apparently the court had faith that most insurance companys' representatives are sophisticated businessmen capable of making a decision about settlement, without the attorney's express recommendation, once they have the benefit of his legal evaluation of the claim.